IN THE HIGH COURT OF UTTRANCHAL AT NAINITAL

Criminal Appeal No. 1746 of 2001
(Old No. 302/1994)

CRIMINAL SIDE:

1. Parvez alias Bakra
2. Arshad ..... Appellants/Appellants

Versus

State of Uttaranchal ..... Respondent.

Mr. S.P.S. Panwar, learned counsel for the appellants.
Mr. A. Rab, learned Addl. Govt. Advocate for the State.

Hon. P.C. Verma, A.C.J.
Hon. Rajesh Tandon,J.

(Delivered by Hon'ble Tandon, J)

By means of the present appeal the appellants namely Parvez @ Bakra and Arshad have challenged the conviction under Section 302/34 I.P.C. and sentencing the appellants to imprisonment for life. Aslam, another co-accused was also convicted under Section 302 I.P.C.

The present appeal is confined to Pervez and Arshad who have been assigned the role under Section 302 I.P.C. read with Section 34 of I.P.C. for causing the death of Raju, Brief facts according to the prosecution story are that the first information report was lodged by one Rajendra on 25th August 1991 at Thana Roorkee stating therein that his brother deceased Raju had some altercation three days back with accused Aslam S/o Sharafat, resident of Mohammadpur on the ground that Aslam used to come in the locality and had a bad eye on the girls of the locality. On this accused Aslam had even told deceased Raju that you pretend to be 'Dada' of this locality and he will see him. The

Prosecution story narrates further that on 25.08.1991 at about 5:45 P.M., complainant Rajender, deceased Raju and one Vinod S/o Vanu were sitting on Double Fatak Pul and at that time Aslam along with Arshad and Parvez came there. Arshad and Parvez caught hold the deceased RAju and thereafter Aslam had fired Raju on his head his pistol.

Prosecution has further submitted that Raju fell then and there and Aslam was arrested on the sopt but Arshad and Parvez somehow managed to escape and could not be arrested. The accused applicants Arshad and Parvez Were charge sheeted under Section 302/34 I.P.C. on the ground that on 25.08.1991 at about 5:45 P.M. they instigated the assailant Aslam for causing the death of Raju, A 315 bore pistol along with empty cartridge was recovered from Aslam on the place of incident.

A perusal of the F.I.R. shows that accused applicants Parvez @ Bakra and Arshad were armless. The F.I.R. reads as under:

श्रीमान् कोतवाल साहब,
थाना रुड़की, जिला हरिद्वार

''आज भाम करीब 5:45 बजे मैं व राजू तथा विनोद पुत्र वानू डबल फाटक पुल पर बैठै थे कि असलम अपने साथी अपने गॉव के अर ाद पुत्र सहीद तथा परेवज उर्फ बकरा को लेकर आया।''

The evidence on the record shows the following injuries on the person of the deceased:

Wound of entry circular in shape with inverted margin 1.7 cm x 1.2 cm deep with laceration.

Buccal cavity area of 4 cm x 3 cm muscle deep around the wound of entry. This wound is surrounded by slight blackening wound of entry in is situated on the right cheek 4 cm. Below middle of right eye brow. Wounds is directed upwords and towards the left side slight blacking is present around the wound.

Fire arm wound of exit with inverted margin 10cm x 5 cm communicating with wound of entry infront and with ceriscal vertebra deep at back situated 1 cm below left moisteu process and on the left side of neck 2 cm below left ear काटने पर निम्नलिखित प्रैक्चर पाये गये upper jaw fracture; mandibee both side fracture, nasal bone fracture, both maxillae fracture, second cervical vertebra.

As will appear from the aforesaid injuries that accused applicants had neither any weapon nor any injuries were accused by the accused applicants on the person of the deceased. The Doctor has reported that all the injuries were gun shot injuries and the same was possible only with a pistol.

The prosecution has also examined P.W. 1 who is the scribe of the F.I.R. He has also stated that accused Aslam has stated that '' राजू को गोली मारो'. There is nothing on record that the accused applicants had any role in inflicting any of the injuries on the person of the deceased. It is also evident from the statement on oath of P.W. 1 that when he along with his brother deceased Raju and one vinod was sitting on the over bridge at that very time accused Aslam along with Arshad and Parvez came there and Aslam told co accused that 'यह बैठा राजू निकालो गोली और मारो साले को। तब अभियुक्तगण अ ारद व परवेज ने राजू को अलग अलग दोनो साइडो से बॉह से पकड लिया'।

The accused applicants were also examined under Section 313 Cr.P.C. The accused applicants Pervez denied when the question was specifically asked to him. The question No. 2 of his statement recorded u/s 313 Cr. P.C. is as under:

ः नः साक्ष्य में आया है कि उक्त दिनाक, समय व स्थान पर लोग भोर मचाते हुये आपके पीछे भागे, सिपाही गवाह देवेन्द्र कुमार भी आ रहा था। इन सवने आप असलम को वही पकड लिया ओर आप परवेज व अ ारद भाग गये। इस बारे में क्या कहना है।

उत्तरः न मौके पर मैजूद था न वहां से भागा

Similarly Arshad had also denied the same when the question was specifically asked to him in his statement recorded under Section 313 of Cr. P.C.

The Sessions Judge has recorded a finding to the following effect:-

> "अभियुक्त अर ाद व परवेज के विद्वान अधिवक्ता का कहाना था कि इन दोनो अभियुक्तों को कोई मनतव्य नहीं था लेकिन मै इस तर्क से सहमत नहीं हूॅ क्योंकि अर ाद व परवेज दोनो को असलम को असलम का दोस्त होना कहा गया अतः उनके द्वारा यदि राजू को मौके पर पकडा गया तब यह माना जायेगा कि मनतव्य तीनों अभियुक्तों को था और उसी मनतव्य के सन्दर्भ में अर ाद व परवेज ने राजू को पकडा और असलम ने गोली मारी।"

Mr. S.P.S. Panwar, learned counsel for the accused applicants has vehemently argued that Section 34 of the I.P.C. has no application in the present case because the ingredients of Section 34 are not attracted at all in the present case. Section 34 reads as under:

> 34. Acts done by several persons in furtherance of common intention.
>
> *When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.*

There is no evidence on the record to prove the common intention of the accused applicants in order to cause the death of Raju. Neither P.W. 1 Rajender, the scribe of the F.I.R. has stated that the accused applicants had common intention to cause the death of Raju and as such any act to caught hold cannot be made liable to sentence the accused applicants under Section 34 read with Section 302 of the I.P.C. Absolutely, there is no meeting of mind and there was no overt act of the accused applicants by the use of weapons and as such ***"in furtherance of the common intention of all"*** being lacking the accused applicants cannot be convicted under Section 302 read with Section 34 of I.P.C. The

Prosecution has also failed to prove the actual participation of the accused applicant for commission of criminal act done in furtherance of common intention at a prior concert.

In State of Orissa Vs Arjun DAs reported in AIR 1999 SC 3229, it has been held by the Apex Court as under:

> *"Regarding accused-respondent Arjuna Das Agarwal we find from the evidence on record that this accused neither went inside the house of the deceased nor took any part in the commission of the murder. He only instigated by shouting the other accused persons. There is nothing in evidence to show that due to his instigation more blows were given by the accused persons. Therefore, no inference can be drawn that this accused-respondent had common intention of causing death of the deceased or that he actually participated in the criminal act. Therefore, high Court rightly acquitted this accused."*

In Ramashish Yadav Vs State of Bihar reported in 1996 96) JT 560, the Apex Court has held that Section 34 of I.P.C. requires pre-arranged plan and pre-supposes prior concert therefore there must be prior meeting of mind and there must be pre-arrangement or premeditated concert. The observation quoted below:

> *"The essence of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct feather of Section 34 is the element of participation in action. The common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a pre-arranged plan and it pre-supposes prior concert.*

Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack."

In view of the aforesaid observations, we are of the opinion that the ingredients of Section 34 of I.P.C. being not attracted, the accused applicants have been wrongly sentenced to life imprisonment. It is evident from the record, that there was neither any evidence of common intention of the accused applicants nor pre-arranged plan to cause the death of the deceased Raju, therefore conviction cannot be sustained.

The appeal is allowed. The accused applicants Parvez @ Bakra and Arshad are, hereby, acquitted of the charges leveled against them and they be set at liberty provided they are not wanted in any other connection. They are already on bail, therefore, their bail bonds will stand cancelled and sureties discharged.

(Rajesh Tandon,J.) **(P.C.Verma, A.C.J.)**

Dated: 22 May 2004.
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